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SATISFACTION OF A COMPELLING GOVERNMENTAL INTEREST OR SIMPLY TWO CONVICTIONS FOR THE PRICE OF ONE?

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I. INTRODUCTION

North Dakota, while not unique, has an interesting jurisdictional composition of federal, state, and tribal jurisdictions.[1] While most practitioners are intimately familiar with the interplay of federal and state jurisdictions, relatively few practitioners are as familiar with the interplay between state and tribal jurisdictions and/or federal and tribal jurisdictions. However, considering the fact that North Dakota has five Indian reservations located either completely or partially within the state, it is likely that most practitioners will have contact either directly or indirectly with one or more of the tribal courts located within the state of North Dakota sometime during their career.[2]

The primary objective of this article is to examine the interplay between federal and tribal criminal jurisdictions. More specifically, this article will examine the circumstances which allow the prosecution in federal court of Native American defendants by the United States following a prior prosecution in the tribal court of the same defendants for crimes arising from the same set of facts.[3] A second objective of this article is to present a number of

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1. An excellent discussion of the parameters of state, federal, and tribal jurisdiction can be found in FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW (1982 ed.).

2. Jesse C. Trentadue, *Tribal Court Jurisdiction Over Collection Suits By Local Merchants and Lenders: An Obstacle To Credit For Reservation Indian?*, 13 AM. INDIAN L. REV. 1, 12 (1987) (citing U.S. Bureau of the Census, Supplementary Report, American Indian Areas and Alaska Native Villages: 1980 Census of Population 24 (1984). The following reservations are located either partially or completely within North Dakota: Fort Berthold, Fort Totten, Standing Rock, Turtle Mountain, and Sisseton Wahpeton. *Id.*

3. *See infra* notes 10-63 and accompanying text. A responsive article, Easton, *Native American Crime Victims Deserve Justice: A Response to Jensen and Rosenquist*, 69 N.D. L. REV. 939 (1993) [hereinafter "Victims Deserve Justice"] has been submitted as a companion

possible challenges to the subsequent prosecution in federal court by the United States.[4] These objectives will be accomplished by first providing an overview of the authors' perceived problem, and by examining the jurisdictional quagmire which gives rise to the problem.[5] The authors will then review the Justice Department's internal *Petite*[6] policy which supposedly limits such prosecutions. Finally, the authors will provide defense practitioners with several possible challenges to such prosecutions.[7]

It is not the intent of this article to advocate that the federal government should refrain from all prosecutions where a tribal court has previously acted. Indeed, the existing jurisdictional structure between federal, state, and tribal courts compels federal prosecution under many circumstances.[8] However, where the tribal court has acted, federal authorities should refrain from using their prosecutorial power where there is no longer an existing compelling and unvindicated governmental interest.[9] The power to prosecute can be abused as well as appropriately used.

II. THE ISSUE: PROSECUTION OF NATIVE AMERICANS BY THE UNITED STATES IN FEDERAL DISTRICT COURT FOLLOWING A PRIOR PROSECUTION OF THE SAME INDIVIDUAL IN A TRIBAL COURT

During the past several years, the general public followed the trial of four Los Angeles, California police officers for the beating of Rodney King. We repeatedly watched the appalling home videotape which captures the brutality inflicted upon a citizen of the United States by members of an organization entrusted to keep the peace. In shock, anger, and despair, we watched the tragic aftermath of the riots in Los Angeles following the acquittal of the four police officers by a jury in the state trial.[10] With ques-

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article to this article. The authors encourage the reader to review both articles with the hope of stimulating further comment and discussion of the interaction of federal, state, and tribal jurisdictions. Although Easton has recharacterized some of the authors' assertions into illogical extremes (i.e. the authors have never proposed that the crimes of murder, rape, or kidnapping go unpunished), Easton has provided an overview from the perspective of the Native American victim.

4. *See infra* notes 103-146 and accompanying text.

5. *See infra* notes 10-63 and accompanying text.

6. The *Petite* policy is named after the United States Supreme Court decision in *Petite v. United States*, 361 U.S. 529 (1960). *See infra* notes 64-102 and accompanying text.

7. *See infra* notes 103-146 and accompanying text.

8. *See infra* notes 44-63 and accompanying text.

9. *See infra* notes 64-79 and accompanying text.

10. *See* Michael A. Dawson, Note, *Popular Sovereignty, Double Jeopardy, and the Dual Sovereignty Doctrine*, 102 YALE L.J. 281, 302 (1992) (citing Tom Mathews, *The Siege of L.A.*, NEWSWEEK, May 11, 1992, at 20).

tions of why the constitutional protection from double jeopardy did not prevent federal prosecutors from retrying the case in a federal district court, we watched the four police officers tried a second time, resulting in the convictions of two of the officers and acquittals of the other two officers.[11]

While at first glance the subsequent prosecution of an individual by federal authorities following a prior prosecution in a separate jurisdiction on charges supported by the same set of facts may seem odd, such circumstances may not be that uncommon in North Dakota. A recent scenario consisted of a Native American juvenile who was convicted by tribal authorities and was subsequently prosecuted for the identical offense by federal authorities.[12] Another recent scenario involved the prosecution of a Native American in federal court who had already been tried and convicted in a tribal court for the same offense.[13] Because the tribal court is limited by federal law in the length of the jail term it may impose upon an individual,[14] the federal authorities retried the case in a federal district court and ultimately obtained a conviction and longer sentence.[15]

"The Supreme Court has long held that an acceptable cost of federalism, tolerable under the principles of both double jeopardy and due process, is the risk of successive prosecutions by state and federal authorities for identical conduct."[16] This principle is often referred to as the "dual sovereignty" doctrine and applies regardless of whether or not the initial prosecution resulted in a convic-

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11. *See generally* Gary A. Hengstler, *How Judges View Retrial of L.A. Cops*, ABA JOURNAL, Aug. 1993, at 70. In a poll conducted by the Gallup Organization, Inc., thirty percent of the responding state court trial judges indicated that the retrial of the police officers in the Rodney King beating case would constitute double jeopardy. *Id.* at 71. In the aftermath of the Rodney King trials, some authors have questioned whether the double jeopardy clause has been swallowed by the dual sovereignty exception. *See* Darlene Ricker, *Double Exposure: Did the Second Rodney King Trial Violate Double Jeopardy?*, ABA JOURNAL, Aug. 1991, at 66.

12. United States v. J.A.L., No. J2-91-88-02 (D.N.D. filed Feb. 19, 1992). *See also* United States v. Azure, No. C2-92-40-01 (D.N.D. filed Oct. 26, 1992).

13. United States v. Lester, 992 F.2d 174 (8th Cir. 1993); United States v. Demery, 980 F.2d 1187 (8th Cir. 1992).

14. *See* 25 U.S.C. § 1302(7) (1988) (providing that tribal courts are limited to the imposition of a sentence not to exceed one year and/or a fine not to exceed $5,000.00).

15. *See, e.g.*, United States v. Demery, 980 F.2d 1187 (8th Cir. 1992). Demery received a one-year sentence by tribal authorities. *Id.* Following a subsequent federal conviction, Demery received a sentence of forty-seven months. *Id.* The authors would like the reader to note that not all federal prosecutions following tribal convictions should be prohibited. *See infra* notes 54-63 and accompanying text. Where genuine compelling unvindicated governmental interests exist, the United States Attorney's Office should use all of its powers and available resources to see that the interests of justice are served.

16. United States v. Aboumoussallem, 726 F.2d 906, 909 (2nd Cir. 1984).

tion[17] or in an acquittal.[18] The dual sovereignty doctrine was recognized by the Supreme Court as early as 1852.[19] Additionally, the dual sovereignty doctrine has been recognized in dual state and federal prosecutions[20] and in dual tribal and federal prosecutions.[21]

The United States Justice Department has promulgated an internal policy which is intended to prevent the unnecessary and unjust prosecution under such circumstances.[22] This policy, often referred to as the "*Petite*" policy, provides that the federal prosecution of an individual following a prior prosecution by a separate sovereign is barred unless there are compelling reasons existing to satisfy an unvindicated governmental interest.[23] However, the

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17. *Id.* (citing Abbate v. United States, 359 U.S. 187 (1959), which upheld the prosecution following a prior conviction in state court).

18. *Id.* (citing Bartkus v. United States, 359 U.S. 121 (1959), *reh'g denied*, 360 U.S. 907 (1959), which upheld the prosecution of a defendant in state court following the acquittal of the defendant in federal court).

19. *Aboumoussallem*, 726 F.2d at 909 (citing Moore v. Illinois, 55 U.S. (14 How.) 13 (1852)). The United States Supreme Court noted in *Aboumoussallem* that there were problems with concurrent federal and state jurisdiction, which were first noted in the case of Houston v. Moore, 18 U.S. (5 Wheat.) 1, 5 (1820). *Id.* at 909 n.1. Abbate v. United States provides a history of the issues arising from the concurrent jurisdiction of state and federal law. 359 U.S. 187, 190-94 (1958).

20. In response to a growing number of state decisions precluding concurrent dual prosecutions, the United States Supreme Court thoroughly considered this question in several cases from 1847 to 1852, beginning with the 1847 decision of *Fox v. Ohio*, which held that the same act may constitute an offense against both the state and federal governments. Fox v. Ohio, 46 U.S. (5 How.) 410 (1847) The United States Supreme Court revisited the dual prosecution issue in 1850 and 1852 when it allowed the criminalization of the same conduct by both the state and federal governments. *See* United States v. Marigold, 50 U.S. (9 How.) 560, 569-70 (1850) (affirming the Court's prior decision in *Fox* by addressing the same federal statute and stating that the same act could be an offense against both the state and the federal government); Moore v. Illinois, 55 U.S. (14 How.) 13 (1852) (holding that the Fifth Amendment does not bar state prosecution for the same offense previously prosecuted by the federal government). Discussion of multiple prosecutions remained dormant for approximately seventy years until the United States Supreme Court's decision in *United States v. Lanza*, which directly upheld the dual prosecution of defendants in state and federal courts. United States v. Lanza, 260 U.S. 377, 382 (1922).

21. *See, e.g.*, United States v. Wheeler, 435 U.S. 313 (1978). *Wheeler* involved the prosecution of a Navajo tribal member who had pleaded guilty to a charge of contributing to the delinquency of a minor. *Id.* at 315. He was subsequently indicted by a federal grand jury on charges of statutory rape for the same factual situation. *Id.* The United States District Court for the District of Arizona granted the defendant's motion to dismiss on the grounds of double jeopardy, and the Court of Appeals for the Ninth Circuit affirmed the lower court's ruling. *Id.* at 316. The United States Supreme Court reversed the Ninth Circuit holding that the tribal court was the arm of a separate sovereign and subsequent federal prosecution was not barred by the double jeopardy clause of the Fifth Amendment. *Id.* at 316-32.

22. UNITED STATES ATTORNEY'S MANUAL § 9-2.142 [hereinafter USAM]. This policy is often referred to as the *Petite* policy, after the Supreme Court decision that first discussed the policy, Petite v. United States, 361 U.S. 529, 530 (1960) (per curiam). The United States Supreme Court has discussed the *Petite* policy on a number of occasions. *See, e.g.*, Rinaldi v. United States, 434 U.S. 22 (1977).

23. USAM § 9-2.142. *See infra* note 62 for a discussion of the application of the *Petite* policy to tribal sovereigns.

application of the *Petite* policy has been erratic and inconsistent.[24]

III. DUAL SOVEREIGNTY AND REASONS WHY THE DOUBLE JEOPARDY CLAUSE DOES NOT PREVENT MULTIPLE PROSECUTIONS

The United States Supreme Court's 1959 decisions in *Bartkus v. Illinois*[25] and *Abbate v. United States*[26] laid the foundation for the principle that there is no bar to successive state and federal prosecutions.[27] The Supreme Court in *Bartkus* upheld the conviction of the defendant on the basis that the Double Jeopardy Clause of the Fifth Amendment of the United States Constitution did not apply to the states and therefore did not prevent the state of Illinois from prosecuting the defendant following an acquittal by a federal jury.[28] In *United States v. Lanza*,[29] the Supreme Court implied that even if the protection of the Double Jeopardy Clause did extend to the states, offenses which are committed against separate sovereigns are not the same offense for the purposes of double jeopardy.[30]

The Supreme Court solidified its decision in *Bartkus* in a second opinion on a related issue the same day in *Abbate*.[31] In *Abbate*, the Supreme Court refined its opinion on dual sovereignty, recognizing that citizens of the United States are also citizens of the individual states.[32] The dual sovereignty of the jurisdictions subjects its citizens to the criminal laws of each sovereign.[33] Each sovereign has an undeniable interest in the enforcement of its criminal laws, and, as such, the prosecution of a defendant by state authorities does not prevent the subsequent prosecution of the same individual by federal authorities, nor does the prosecution of an individual by federal authorities prevent a subsequent prosecution of the individual for the same act by the

24. Joseph S. Allerhand, Note, *The Petite Policy: An Example of Enlightened Prosecutorial Discretion*, 66 GEO. L. J. 1137, 1138 (1978); Dawson, *supra* note 10, at 293. "[W]hile the policy limits the instances of federal prosecutions following state prosecutions, such prosecutions are brought routinely." *Id.* at 294.

25. 359 U.S. 121 (1959).

26. 359 U.S. 187 (1959).

27. Bartkus v. Illinois, 359 U.S. 121, 128-39 (1958); Abbate v. United States, 359 U.S. 187, 196 (1958).

28. *Bartkus*, 359 U.S. at 121-24, 138.

29. 260 U.S. 377 (1922).

30. United States v. Lanza, 260 U.S. 377, 382 (1922).

31. 359 U.S. 187 (1959).

32. Abbate v. United States, 359 U.S. at 192 (citing Moore v. Illinois, 55 U.S. (14 How.) 13, 20 (1852)).

33. *Id.*

state authorities.[34] Therefore, in order to avoid the undesirable consequence of estopping a sovereign from enforcing its criminal laws, the Supreme Court concluded that the Double Jeopardy Clause of the Fifth Amendment could not bar subsequent prosecutions by separate sovereigns.[35]

In 1969, the United States Supreme Court elected to apply the protection of double jeopardy to the states, thereby eliminating the original basis for allowing double prosecution in *Bartkus*.[36] However, the Court simply switched its emphasis from the question of whether the protection of the Double Jeopardy Clause applied to the states to the alternative position, previously preserved in *Bartkus*, which was that dual sovereignty allowed dual

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34. *See, e.g.*, United States v. Lanza, 260 U.S. 377 (1922). "[*Lanza*] was the first case in which [the Supreme Court] squarely held valid a federal prosecution arising out of the same facts which had been the basis of a state conviction . . . ." *Bartkus*, 359 U.S. at 129. In *Abbate*, the Court quoted from the *Lanza* decision:

> "We have here two sovereignties, deriving power from different sources, capable of dealing with the same subject-matter within the same territory. . . . Each government in determining what shall be an offense against its peace and dignity is exercising its own sovereignty, not that of the other.
>
> It follows that an act denounced as a crime by both national and state sovereignties is an offense against the peace and dignity of both an may be punished by each. The Fifth Amendment, like all the other guaranties in the first eight amendments, applies only to proceedings by the Federal Government, . . . and the double jeopardy therein forbidden is a second prosecution under authority of the Federal Government after a first trial for the same offense under the same authority."

Abbate, 359 U.S. at 194 (quoting United States v. Lanza, 260 U.S. 377, 382 (1922) (ellipses in original).

35. *Abbate*, 359 U.S. at 195. In *Abbate*, the Court stated that "undesirable consequences" would result if double jeopardy barred dual prosecutions. *Id.*

> Prosecution by one sovereign for a relatively minor offense might bar prosecution by the other for a much graver one, thus effectively depriving the latter of the right to enforce its own laws. While, the Court said, conflict might be eliminated by making federal jurisdiction exclusive where it exists, such a "marked change in the distribution of powers to administer criminal justice" would not be desirable.

United States v. Wheeler, 435 U.S. 313, 318 (1978) (quoting *Abbate*, 359 U.S. at 195) (footnotes omitted).

36. Benton v. Maryland, 395 U.S. 784, 793-96 (1969) (overruling Palko v. Connecticut, 302 U.S. 319 (1937)) (superseded by statute as stated in Condemarin v. University Hosp., 775 P.2d 348 (1989)). Prior to 1969, the Supreme Court had held that the Double Jeopardy Clause did not apply to the states. *Bartkus*, 359 U.S. at 124. Therefore, the protections of the Fifth Amendment did not prevent dual prosecutions from occurring. *Id.*

> Before 1969, the Double Jeopardy Clause did not apply to the states. Indeed, the Supreme Court specifically rejected the argument that the Fourteenth Amendment made the Double Jeopardy Clause applicable to the states in *Palko v. Connecticut*. The Court reasoned that the Double Jeopardy Clause was not so fundamental as to warrant application to the states. Only in cases of "acute and shocking" hardship would the Court prohibit double jeopardy by the states—and then under the rubric of due process.

Dawson, *supra* note 10, at 290 (footnotes omitted). In *Benton*, the Court overruled the decision in *Palko* by recognizing that the Double Jeopardy Clause was a "fundamental ideal" and of such importance that it must be applied to the states. *Benton*, 395 U.S. at 794.

prosecutions by separate sovereigns.[37] Therefore, while the prosecution of the Double Jeopardy Clause could prevent two prosecutions by the same sovereign, those protections do not prevent prosecution by several sovereigns for the same criminal act.

The separate sovereignty of individual states is fundamental to our federalist system.[38] However, Indian reservations do not enjoy the same status as states.[39] Instead, Indian reservations, run by individual tribes, exist as quasi-sovereigns established by an attempt to balance the interest of tribal self-government and the federal interest of limiting the tribe's external power.[40]

The sovereignty of the tribes was initially preserved by three United States Supreme Court cases decided during the mid-1800s.[41] Those three decisions provide the foundation for preserv-

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37. *Bartkus*, 359 U.S. at 128-39. In *Bartkus* and *Abbate*, the Supreme Court determined that federal prosecutions were not prohibited because of a prior state prosecution for the following two reasons: 1) the Double Jeopardy Clause of the Fifth Amendment did not apply to the states, and 2) even if the Double Jeopardy Clause of the Fifth Amendment were to apply, the dual sovereignty doctrine allowed prosecutions by the state and federal government. *Bartkus*, 359 U.S. at 124-26; *Abbate*, 359 U.S. at 195. *Benton* eliminated the first basis for the holdings in *Bartkus* and *Abbate*, but kept alive the dual sovereignty doctrine. Benton v. Maryland, 395 U.S. 789 (1969).

38. *Bartkus*, 359 U.S. at 137-39. In *Bartkus*, Justice Frankfurter, writing for the Court, noted:

> Some recent suggestions that the Constitution was in reality a deft device for establishing a centralized government are not only without factual justification but fly in the face of history. It has more accurately been shown that the men who wrote the Constitution as well as the citizens of the member States of the Confederation were fearful of the power of centralized government and sought to limit its power. . . . Time has not lessened the concern of the Founders in devising a federal system which would likewise be a safeguard against arbitrary government.

Id. at 137. Even recently the Supreme Court has noted that the basis of the dual sovereignty doctrine derives from the federalist form of government in which "State and Federal Governments '[derive] power from different sources,' each from the organic power that established it." United States v. Wheeler, 435 U.S. 313, 320 (1978) (citing United States v. Lanza, 260 U.S. 377, 382 (1922). "The unique concept of dual sovereignty arises from the federal system under which state governments and the federal government coexist." United States v. Belcher, 762 F. Supp. 666, 671 (D. Ct. Va. 1991) (Amendment denied, 769 F.Supp. 201 (1991).

39. *See, e.g.*, United States v. Kagama, 118 U.S. 375, 381-82 (1886) ("[Tribes] were, and always have been, regarded as having a semi-independent position when they preserve their tribal relations; not as states, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people, with the power of regulating their internal and social relations . . ."). While Indian nations are considered sovereign entities, they are no longer "possessed of the full attributes of sovereignty." *Id.* at 381. In *United States v. Wheeler*, the Court noted the following in discussing *Kagama* and Indian sovereignty: "Their incorporation within the territory of the United States, and their acceptance of its protection, necessarily divested them of some aspects of the sovereignty which they had previously exercised." United States v. Wheeler, 435 U.S. 313, 323 (1978). "The sovereignty that the Indian tribes retain is of a unique and limited nature." *Id.*

40. *Id.* at 322-24. While the sovereignty of Indian tribes has been eroded, the tribes still possess attributes of sovereignty which extends over both its people and territory. *Id.* at 323.

41. Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832) (abrogation recognized by People v. Snyder, 532 N.Y. S.2d 827 (1988)); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831);

ing tribal self-government within the federalist framework.[42] While these three early Supreme Court decisions articulated a policy of preserving tribal self-government, the United States Constitution provides Congress with the ultimate and exclusive power over the tribes and their affairs.[43]

Utilizing its constitutional authority, Congress has provided a legislatively mandated structure for criminal jurisdiction for tribal courts and federal courts over crimes occurring on tribal lands.[44] There are two significant pieces of legislation that control criminal jurisdiction in Indian Country: the Indian Country Crimes Act[45] and the Indian Major Crimes Act.[46]

The Indian Country Crimes Act provides the broadest extension of jurisdiction over the tribes by the federal government.[47] The Indian Country Crimes Act provides the following:

> Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian Country.
>
> This section shall not extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian Country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offense is or may be secured to the Indian tribes respectively.[48]

The above text of the Indian Country Crimes Act discloses

Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823). For further discussion on *Worcester* and other tribal sovereignty opinions and the consistency with which they have been followed, the authors suggest referring to Felix S. Cohen, *Indian Rights and the Federal Courts*, 24 MINN. L. REV. 145, 148-49 (1940).

42. United States v. Wheeler, 435 U.S. 313, 322-23 (1978). Indian tribes are located within the territory of the United States and are subject to ultimate federal control. *Id.* at 322. However, the Indian peoples remain 'a separate people, with the power of regulating their internal social relations.' *Id.* (quoting United States v. Kagama, 118 U.S. 375, 381-82 (1886)).

43. COHEN, *supra* note 1, at ch. 6, § A1, p. 282. Congressional power over Indian tribes "is beyond doubt in most situations." *Id.*

44. *See generally* 18 U.S.C. §§ 1151-1170 (1988 & Supp. III 1991).

45. 18 U.S.C. § 1152 (1988 & Supp. III 1991). This Act has been referred to by a number of names, including, but not limited to the "General Crimes Act" and the "Interracial Crimes Act."

46. 18 U.S.C. § 1153 (1988 & Supp. III 1991).

47. 18 U.S.C. § 1152 (1988 & Supp. III 1991).

48. *Id.* The Supreme Court has held that crimes which are wholly non-Indian crimes fall under state criminal jurisdiction, regardless of the fact that they may have occurred on tribal land. *See* United States v. McBratney, 104 U.S. 621, 624 (1881).

two broad exceptions to the prosecution of Indian defendants by federal authorities.[49] First, offenses which are committed by Indians against Indians would be excluded from federal prosecution.[50] The second exception would prevent the prosecution of any Indian who had previously "been punished by the local law of the tribe."[51] Read in isolation, the exceptions enumerated in the Indian Country Crimes Act would appear to preserve the protection from double jeopardy for Indians who had been previously punished by the tribe from being prosecuted by the United States.[52] The purpose of the Indian Country Crimes Act and these exceptions was to recognize tribal self-government and sovereignty.[53]

However, the exemption from prosecution of individuals who had previously been punished by the tribal authorities had the potential for great injustice.[54] For example, an individual could avoid federal prosecution of a serious crime by simply submitting to the tribal authorities and subjecting herself/himself to the penalties imposed for a lesser offense.[55] In response to this potential misuse of the exception to the Indian Country Crimes Act, Congress enacted the Major Crimes Act.[56]

The Major Crimes Act specifically identified fourteen offenses

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49. 18 U.S.C. § 1152 (1988 & Supp. III 1991). COHEN, *supra* note 1, at ch. 6, § A2(a), p. 288. On its face, the Indian Country Crimes Act appears very broad. However, its application has been substantially limited by judicial interpretations and the exceptions found within the Act itself. *Id.*

50. 18 U.S.C. § 1152 (1988 & Supp. III 1991).

51. *Id.*

52. *Id.*; COHEN, *supra* note 1, at ch. 6, § A2(a)(1), p. 290. There are no reported cases on this issue. *Id.* Additionally, the Supreme Court has specifically held that the Double Jeopardy Clause of the Fifth Amendment does not bar dual federal and tribal prosecutions. United States v. Wheeler, 435 U.S. 313, 313 (1978).

53. COHEN, supra note 1, at ch. 6, § A2(a)(1), p. 290-98.

54. *Id.* at p. 290. An example of this injustice allegedly occurred in *Ex Parte Crow Dog*, 109 U.S. 556 (1883). The Supreme Court held in *Ex Parte Crow Dog* that an Indian accused of murdering another Indian in Indian Country could not be tried in either federal or territorial courts. *Id.* at 572.

55. *See Ex Parte Crow Dog*, 109 U.S. 556 (1883). In *United States v. Wheeler*, the Supreme Court described the problem:

> Thus, when both a federal prosecution for a major crime and a tribal prosecution for a lesser included offense are possible, the defendant will often face the potential of a mild tribal punishment and a federal punishment of substantial severity. Indeed, the respondent in the present case faced the possibility of a federal sentence of 15 years in prison, but received a tribal sentence of no more than 75 days and a small fine. In such a case, the prospect of avoiding more severe federal punishment would surely motivate a member of a tribe charged with the commission of an offense to seek to stand trial first in a tribal court. Were the tribal prosecution held to bar the federal one, important federal interests in the prosecution of major offenses on Indian reservations would be frustrated.

Wheeler, 435 U.S. 313, 330-31 (1978).

56. COHEN, *supra* note 1, at ch. 6, § A2(b), p. 300.

which, if committed in Indian country, constitutes federal crimes.[57] The Major Crimes Act does not exclude individuals who had previously been punished by local tribal law from punishment by the United States.[58] While some authorities believe that the exception should not be limited to the Indian Country Crimes Act, the United States Supreme Court observed in *United States v. Wheeler*[59] that the protections of the Double Jeopardy Clause do not prevent the prosecution of an individual by the federal government for the same acts previously punished by the tribal court.[60] In *Wheeler*, the Supreme Court clearly provided that the inherent powers of the tribes arise from their retained sovereignty and not from the sovereignty of the United States.[61] Because tribal authority arises from the tribal sovereignty, the tribes must be treated as separate sovereigns similar to the states with respect to the application of the Fifth Amendment protection from double jeopardy.[62] Therefore, the Double Jeopardy Clause of the Fifth

57. 18 U.S.C. § 1153(a) (1988). The following is a list of crimes that if committed in Indian Country, could still be prosecuted by the federal government: murder, manslaughter, kidnapping, maiming, rape, incest, assault with a dangerous weapon, assault with intent to commit murder, assault resulting in serious bodily injury, arson, burglary, robbery, and a felony under section 661. 18 U.S.C. § 1153(a) (1988 & Supp. III 1991). This article has focused upon these crimes which would commonly be considered less serious: burglary, robbery, and theft. This is not to imply that these crimes should be ignored, but it is with those crimes that tribal courts have been able to provide sufficient penalties to eliminate the government's compelling unvindicated interests. For example, in the case of *United States v. Azure*, the defendant had previously spent thirty-five days in tribal custody. United States v. Azure, No. C2-92-40 (D.N.D. 1992). The federal sentencing guidelines provided a sentence range of zero to six months, with the United States Attorney's Office recommending no further custody. It is under these types of circumstances that the authors believe no further prosecution is necessary and no *compelling* unvindicated interest remains. Discouragingly, in *Victims Deserve Justice*, *supra* note 3, at nn.4-5 and accompanying text, Mr. Easton prefers to focus on the crimes of murder and rape rather than focusing on the issues asserted in this article.

58. United States v. Wheeler, 435 U.S. 313, 329 (1978).

59. 435 U.S. 313 (1978)

60. United States v. Wheeler, 435 U.S. 313, 323-24 (1978).

61. *Id.* at 328.

62. *Id.* "Since tribal and federal prosecutions are brought by separate sovereigns, they are not 'for the same offense,' and the Double Jeopardy Clause thus does not bar one when the other has occurred." *Id.* at 329-30.

In *Victims Deserve Justice*, *supra* note 3, Mr. Easton argues that the *Petite* policy does not apply to Indian reservations. *See Victims Deserve Justice*, *supra* note 3, at nn.67-93 and accompanying text. The authors respectfully disagree. In *United States v. Lester*, a case argued by Mr. Easton for the Appellant (the United States), the Eighth Circuit Court of Appeals was presented with the argument that the *Petite* policy should prevent the prosecution of an individual in a federal court once the defendant had been convicted of a crime in tribal court for conduct arising out of the same set of facts. United States v. Lester, 992 F.2d 174, 175 (8th Cir. 1993). United States District Court Judge for the District of North Dakota Patrick A. Conmy had dismissed the prosecution in the trial court. *Id.* Assuming Mr. Easton raised the same arguments to the Eighth Circuit as are raised in his article, we are left with the conclusion that the Eighth Circuit did not adopt Mr. Easton's reasoning. In *Lester*, the Eighth Circuit reversed the dismissal on the basis that the *Petite* policy did not create any substantive rights. *Id.* at 176 (citing United States v. Simpkins, 953 F.2d 443, 445 (8th Cir. 1992); United States v. Bartlett, 856 F.2d 1071, 1075 (8th Cir. 1988).

Amendment is not applicable to second prosecutions by the federal government because federal prosecutions and tribal prosecutions are "arms of separate sovereigns."[63]

IV. THE *PETITE* POLICY AND ITS INTENDED BAR OF DOUBLE PROSECUTIONS

The *Petite* policy is an internal Justice Department policy which "precludes the initiation or continuation of a federal prosecution following a state prosecution or a prior federal prosecution based on substantially the same act, acts or transactions unless there is a compelling federal interest supporting the dual or successive federal prosecution."[64] The policy was named after the United States Supreme Court decision in *Petite v. United States.*[65] The *Petite* policy serves dual purposes: assuring fairness to the defendant by protecting the defendant for unfair multiple prosecutions and/or punishments for the same acts, and promoting the efficient use of Justice Department resources.[66] The *Petite* policy regulates prosecutorial discretion to accomplish its two purposes.[67]

It is the authors' opinion that the Eighth Circuit's silence on an issue presumably raised by Mr. Easton is more likely to imply that the argument was meritless as opposed to dispositive.

63. *Wheeler*, 435 U.S. at 330.

64. USAM § 9-34. The United States Justice Department has a longstanding policy which is intended to prohibit unnecessary multiple prosecutions. *See* Rinaldi v. United States, 434 U.S. 22, 24 (1977). The *Petite* policy requires prior approval and a compelling interest justifying the prosecution. *See generally* Thompson v. United States, 444 U.S. 248 (1980).

65. 361 U.S. 529 (1960).

66. Rinaldi v. United States, 434 U.S. 22, 27 (1977). "The policy is useful to the efficient management of limited Executive resources and encourages local responsibility in law enforcement. But it also serves the more important purpose of protecting the citizen from any unfairness that is associated with successive prosecutions based on the same conduct." *Id.* The following portions of a press release by Attorney General Rogers at the time the policy was instituted are quoted in *Rinaldi*:

> Cooperation between federal and state prosecutive officers is essential if the gears of the federal and state systems are to mesh properly. We should continue to make every effort to cooperate with the state and local authorities to the end that the trial occur in the jurisdiction, whether it be state or federal, where the public interest is best served. If this be determined accurately, and is followed by efficient and intelligent cooperation of state and federal law enforcement authorities, then the consideration of a second prosecution very seldom should arise. . . .
>
> It is our duty to observe not only the rulings of the Court but the spirit of the ruling as well. In effect, the Court said that although the rule of the *Lanza* case is sound law, enforcement officers should use care in applying it. Applied indiscriminately and with bad judgment it, like most rules of law, could cause considerable hardship. Applied wisely, it is a rule that is in the public interest. Consequently—as the Court clearly indicated—those of us charged with law enforcement responsibilities have a particular duty to act wisely and with self-restraint in this area.

Id. at 27-29 (quoting Department of Justice Press Release, Apr. 6, 1959, p. 3).

67. *Id.* at 27. "The policy is intended to regulate prosecutorial discretion in order to

The *Petite* policy was developed as a direct result of the United States Supreme Court's decisions in *Bartkus v. United States*[68] and *Abbate v. United States*.[69] The policy was promulgated on April 6, 1959, by Attorney General Rogers and provided that after a state prosecution there should be no federal trial for substantially the same act "unless the reasons are compelling."[70] Attorney General Rogers anticipated that the policy would encourage the efficient management of resources and help to encourage local responsibility in law enforcement by limiting the prosecutor's discretion to initiate prosecution.[71] However, in *Rinaldi v. United States*,[72] the Supreme Court recognized that the most important purpose of the policy was to protect the accused citizen from the potential unfairness of being repeatedly prosecuted for the same act.[73]

If circumstances exist which would give rise to the application of the policy, the local United States Attorney is required to seek authorization from the appropriate Assistant Attorney General prior to initiating the second prosecution.[74] The failure to secure approval prior to the double prosecution may result in the loss of the conviction through a dismissal of the charges unless the prosecuting attorney is able to show both a compelling federal interest to support the prosecution and can demonstrate a compelling reason as to why prior approval was not obtained.[75]

Approval must be sought in all instances where there has been prior proceedings which resulted in either a conviction, acquittal, dismissal, or other termination of the proceedings on the merits.[76] The approval must be obtained prior to the acceptance of a guilty plea or the start of trial.[77]

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promote efficient utilization of the Department's resources and to protect persons charged with criminal conduct from the unfairness associated with multiple prosecutions and multiple punishments for substantially the same act or acts." USAM § 9-2.142(A).

68. 359 U.S. 121 (1959).

69. 359 U.S. 187 (1959). "What came to be known as the *Petite* policy was formulated by the Justice Department in direct response to this Court's opinions in *Bartkus v. United States* . . . and *Abbate v. United States* . . . , holding that the Constitution does not deny the State and Federal Governments the power to prosecute the same act." *Rinaldi*, 434 U.S. at 28. *See also* Allerhand, *supra* note 24, at 1138-39.

70. *Rinaldi*, 434 U.S. at 24 n.5. *See supra* note 66. Substantial portions of Attorney General Rogers' April 6, 1959 memo can be found in *Rinaldi*, 434 U.S. 22 (1977).

71. Allerhand, *supra* note 24, at 1142.

72. 434 U.S. 22 (1977).

73. Rinaldi v. United States, 434 U.S. 22, 27 (1977).

74. USAM § 9-2.142; *see generally* United States v. Jones, 808 F.2d 561, 565 (7th Cir. 1986) (discussing the need for special approval for a successive prosecution).

75. *Id.*

76. *Id.* at 9-35 (footnote omitted).

77. *Id.*

The general guidelines of the Justice Department Manual mandates that federal prosecution will not be authorized unless the prior prosecution "left substantial federal interests demonstrably unvindicated."[78] Even when a substantial federal interest remains unvindicated, prosecution is not to be approved if the prior proceeding resulted in a conviction, unless the United State's Attorney's Office anticipates that the subsequent federal proceedings will result in a significantly enhanced punishment.[79]

V. THE APPLICATION OF THE *PETITE* POLICY HAS BEEN INCONSISTENT

The application of the *Petite* policy has been erratic and unpredictable.[80] As the reader will discover in the remainder of the article, it is difficult, if not impossible, to enforce the *Petite* policy.[81] The policy is internal to the Justice Department and courts have been reluctant to enforce the policy against the United States Attorney's Office.[82] This leaves the administration and application of the policy in the hands of the prosecution.[83] The abundance of

78. *Id.* at 9-38 (footnote omitted). "A federal prosecution will not be authorized unless the state/prior federal proceeding left substantial federal interests demonstrably unvindicated. Even so, a dual or successive prosecution is not warranted unless a conviction is anticipated and—if the state/prior federal proceeding resulted in a conviction—normally will be authorized unless an enhanced sentence in the subsequent federal prosecution is anticipated." USAM § 9-2.142.

79. *Id.*; *see also infra* note 82.

80. Dawson, *supra* note 10, at 293-94.

> The *Petite* policy is an incomplete limitation on federal prosecution following state prosecution, however. The policy is invoked at the government's discretion. It does not confer upon those prosecuted for state crimes the right to challenge a subsequent federal prosecution in violation of the policy. Cases in which the Supreme Court vacated and remanded convictions under the *Petite* policy have been disposed of by *per curiam* order so as to avoid creating any impression of the existence of a "right of criminal defendants to obtain enforcement of the policy." Furthermore, while the policy limits the instances of federal prosecutions following state prosecutions, such prosecutions are brought routinely.

Id. (footnotes omitted). *See also* Allerhand, *supra* note 24, at 1138.

> The policy envisions an enlightened use of prosecutorial discretion to assure fairness to defendants as well as a minimum of wasted effort. The present administration of the policy, however, raises serious doubts about whether either of these goals is being achieved: the Department of Justice has failed to reduce the policy's broad formulations to specific guidelines, and exceptions to the policy remain undefined and open ended.

Id. (footnotes omitted).

81. *See, e.g.* United States v. Bartlett, 856 F.2d 1071, 1075 (8th Cir. 1988) (stating that "the *Petite* policy does not generally confer substantive rights"). *See also* Allerhand, *supra* note 24, at 1145-46.

82. *See* United States v. Jones, 334 F.2d 809, 812 (7th Cir. 1964) *cert. denied*, 379 U.S. 993 (1965). The enforcement of the *Petite* policy rests in the hands of the Department of Justice. *Id.* The courts should not attempt to enforce the *Petite* policy, but should allow the Department of Justice to use its discretion as to when the policy should be applied. *Id.*

83. *Id.* Courts have even been reluctant to determine whether or not a compelling

cases in which defendants have unsuccessfully attempted to persuade courts to enforce the *Petite* policy provides ample evidence that the discretion to prosecute remains with the government and that prosecutions will be brought regardless of the intended purposes of the *Petite* policy.[84] In some instances, even the federal judiciary has become frustrated with the failure to utilize the *Petite* doctrine to limit prosecutions where it felt the appropriate circumstances existed.[85]

The personal experience of the authors and comments from the practicing bar indicated that more often than not, the United States Attorney's Office for the District of North Dakota has been reluctant to drop prosecutions once they have been initiated.[86] The reluctance to drop prosecutions has at times been contrary to the intended purpose of the *Petite* policy. For example, the United States Attorney's Office for the District of North Dakota recently prosecuted a member of the Turtle Mountain Band of the Chippewa for theft.[87] The federal prosecution was initiated after

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unvindicated governmental interest is present. *See, e.g.*, United States v. Frumento, 409 F. Supp. 136 (E.D. Pa. 1976).

84. *See, e.g.*, United States v. Lester, 992 F.2d 174 (8th Cir. 1993); United States v. Simpkins, 953 F.2d 443 (8th Cir. 1992) *cert. denied*, 112 S. Ct. 1988 (1992); United States v. Bartlett, 856 F.2d 1071 (8th Cir. 1988); United States v. Aboumoussallem, 726 F.2d 906 (2nd Cir. 1984). Despite the proclamations in the *Petite* policy, federal prosecutions following state prosecutions have become routine. Dawson, *supra* note 10, at 294.

85. *See* United States v. Belcher, 762 F. Supp. 666 (W.D. Va. 1991) (Amendment denied, 769 F.Supp. 201 (1991). While finding an alternative route to dismiss an unfair prosecution, the United States District Court for the Western District of Virginia stated:

> Though the court is loath to tell the United States Attorney how to conduct his affairs, it is important to realize that the United States Attorney's application of the *Petite* Doctrine is inconsistent with the Doctrine's terms. . . . At least it is certain that there has not been a finding of a "compelling federal interest" in this case. . . . [This] court personally is persuaded that the Petite Doctrine should confer substantive rights on criminal defendants. The Court agrees with the dissenting opinion in United States v. Thompson . . . .

Belcher, 762 F. Supp. at 674-75, nn. 5-6 (citations omitted).

86. This is contrary to the assertions of Mr. Easton in *Victims Deserve Justice*, *supra* note 3. The authors wish to note that they have substantially more experience in criminal cases than Mr. Easton would have the reader believe. The authors collectively have defended approximately 300 criminal matters to date. Moreover, Mr. Rosenquist, whose undergraduate degree was in criminal justice, effected approximately 400 arrests on over 1600 citations and warrants issued during a five-year stint as a police officer. Admittedly, the lion's share of the above experience did not involve the federal court system. The authors have, however, appeared as both defense counsel and the state's witness in hundreds of criminal cases. Not once in the authors' personal experience has the federal government decided that it had a substantial unvindicated federal interest requiring a subsequent prosecution based on the same set of facts, for any previously-tried state's case. Mr. Easton, as well as the reader, is undoubtedly aware that not all of the above cases resulted in a conviction and a jail/prison sentence equal to or within the range of the Federal Sentencing Guidelines. The rhetorical question skirted by Mr. Easton remains unanswered: Why are Indians routinely prosecuted twice for the same crime while Caucasians are not?

87. United States v. Azure, No. C2-92-40-01 (D.N.D. filed Oct. 26, 1992). The defendant was charged with a violation of 18 U.S.C. § 1153, 661 and 662. *Id.*

the individual had previously been prosecuted in the tribal court and had been incarcerated for a period of thirty-five days.[88] The defendant pled guilty to the federal charges and the United States Attorney's Office recommended to the court that no jail time should be imposed.[89]

A similar case was that of *United States v. J.A.L.*[90] In that case, two juveniles had taken and damaged a vehicle. Both admitted their involvement in tribal court proceedings and were punished by the court, consistent with similar situations handled by North Dakota state juvenile courts. The United States Attorney's Office prosecuted both juveniles again, obtained convictions, and recommended no rehabilitative time in either a state or federal juvenile center.[91]

While the increased nature of the federal crime in the situation above may have provided a basis for the federal prosecution, prosecution under such circumstances seems contrary to the *Petite* policy's goal of efficiently allocating law enforcement resources and providing fairness to the defendant.[92] Furthermore, the additional burden on the already overloaded federal court system should have been reason enough to prevent the prosecution of an individual who had already served time in jail and who the prosecution recommended should not serve any more jail time.[93] The cost of the court's time, the cost of providing court-appointed defense counsel, and the administrative costs associated with the

88. The authors made repeated requests to receive a copy of the tribal court records but had been unsuccessful in doing so on the date this article was submitted.

89. *Azure*, No. C2-92-40-01. The United States Attorney's Office recommendation of no term of incarceration returned some level of fairness to the proceedings. Unfortunately, the court elected not to follow those recommendations and sentenced the defendant to three months of incarceration.

90. J2-91-88-02 (D.N.D. filed Feb. 19, 1992).

91. United States v. J.A.L., J2-91-88-02 (D.N.D. filed Feb. 19, 1992). The names of the juveniles cannot be disclosed. Following their respective admissions to being involved in the delinquent behavior, they were ordered by the Tribal Court to undergo a sixty day evaluation at the State Industrial School in Mandan, North Dakota, and ordered to pay restitution. The tribal court retained jurisdiction over the matter for sentencing based on the outcome of their respective evaluations. While awaiting space and transportation back to Mandan, both boys were incarcerated in the Belcourt jail for almost three weeks. They were released to the custody of their parents on the morning another inmate had committed suicide. Two months later, still having not been sent to Mandan for evaluation, the boys both received a summons to appear in federal court for the same crime. Ultimately, both admitted their involvement and were sentenced pursuant to Federal Juvenile Justice requirements. (In juvenile court, defendants do not plead guilty or not guilty to a crime, but admit or deny their involvement in the crime.) In this case, they were given probation and ordered to make restitution.

92. USAM § 9-2.142. Tribal court punishments are limited to no greater than one year of imprisonment and/or a $5,000 fine. 25 U.S.C. § 1302(7). The federal government has jurisdiction over many major crimes on reservations and may impose more severe penalties. 18 U.S.C. § 1153. (1988 & Supp. 1993). *See also supra* note 48.

93. *Azure*, No. C2-92-40-01.

prosecution were all unnecessary.[94]

In an informal survey provided to the North Dakota Bar, persons who had experienced defending tribal members in federal court following a prior conviction in the tribal justice system indicated that very few, if any, instances existed where a federal prosecution was dismissed pursuant to the *Petite* policy. While there are certainly a number of possible reasons for this, it is interesting to note that of the forty individuals who responded that they had experienced dual prosecution of Native Americans, only one of those individuals had experienced the double prosecution in state and federal court. Again, this could be explained by the increased role of the United States Attorney's Office on the reservations, the fact that the survey excluded individuals that may have experienced only state and federal double prosecution, or the internal differences in the operation of the tribal courts as opposed to North Dakota state courts.[95]

VI. JUDICIAL RELUCTANCE TO ENFORCE THE POLICY

Numerous defendants have attempted and failed to gain judicial intervention and enforcement of the *Petite* policy.[96] Most of the federal circuits have at least partially addressed this question and held that a defendant does not have an enforceable right

94. In *Victims Deserve Justice, supra* note 3, Mr. Easton criticizes the authors and tries to convince the reader that Jensen and Rosenquist advocate a laissez faire, "hands off," approach by the federal government when Native Americans accused of heinous crimes on Indian Reservations, such as murder, manslaughter, kidnapping, and rape, or perhaps a combination thereof, and are subsequently convicted of some lesser included misdemeanor offense by the tribal court. *Victims Deserve Justice*, n.1-12 and accompanying text. It should be obvious through the tone of this article that the authors are speaking of and concerned with only those crimes that do not leave substantial unvindicated federal interests once the tribal court has adjudicated them, but nevertheless result in subsequent federal prosecution. To assert that the authors advocate misdemeanor sentences (normally defined as crimes whereby the maximum sentence that can be imposed is a fine and/or incarceration for under one year) for major heinous crimes is misleading. This article would never have been written had it not been for the authors' perceived abuses of the *Petite* policy by the United States Attorney's Office. The authors would like to remind the reader that there may remain substantial, unvindicated federal interests requiring federal prosecution in a case where a Native American accused of one of the aforementioned infamous and heinous crimes is convicted and punished by the tribal court for a lesser included offense. The unfairness arises when the powers and resources of the United States Attorney's Office are used to reprosecute juveniles and petty theives who have already been punished for the offense and who will probably not be subject to any additional custodial time after the federal conviction. Under those circumstances, the United States Attorney's Office has not satisfied a compelling unvindicated interest; but instead, wasted governmental and judicial resources as well as inappropriately prosecuting the defendant.

95. *See* 25 U.S.C. § 1302(7) (tribal courts have punitive powers which are limited to up to a year of imprisonment and/or a $5,000 fine). The limited powers of tribal courts may leave a compelling governmental interest unvindicated; however, as in *Azure*, it is the authors' opinion that the prosecutions are motivated by reasons other than government interest.

96. *See supra* note 81 and *infra* note 97.

under the *Petite* policy.[97] The Eighth Circuit recently addressed this question in *United States v. Simpkins*.[98] In *Simpkins*, the Eighth Circuit held that "the Petite Policy does not confer any substantive rights on a criminal and, thus, 'cannot form the basis of a claim that the subsequent prosecution was improper.' "[99]

Enforcement of the *Petite* policy is denied by courts on the basis that the Policy is an internal guideline of the United States Department of Justice.[100] Generally, an internal policy of a federal department is not enforceable by defendants or other individuals and therefore cannot be used by a defendant, by itself, to prevent the dual prosecution.[101] Several courts have specifically held that Department of Justice guidelines are not enforceable and cannot be used by a defendant to bar prosecution by the United States.[102]

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97. *See,* United States v. Davis, 906 F.2d 829, 832 (2nd Cir. 1990) (recognizing the existence of the *Petite* policy but concluding that "nothing prevents a federal prosecution whenever the state proceeding has *not adequately* protected the federal interest.") (emphasis added); United States v. Catino, 735 F.2d 718, 725 (stating that the *Petite* policy "affords defendants no substentive rights") (2nd Cir. 1984); *see also* United States v. Simpkins, 953 F.2d 443 (8th Cir. 1992); United States v. Raymer, 941 F.2d 1031 (10th Cir. 1991); United States v. Rodriguez, 948 F.2d 914 (5th Cir. 1991); United States v. Jones, 808 F.2d 561 (7th Cir. 1986); Andiarena v. Keohane, 691 F.2d 993 (11th Cir. 1982); United States v. Brooklier, 685 F.2d 1208 (9th Cir. 1982); United States v. Renfro, 620 F.2d 569 (6th Cir. 1980); United States v. Howard, 590 F.2d 564 (4th Cir. 1979). *Compare* United States v. Heffner, 420 F.2d 809, 811 (4th Cir. 1969) (stating that a government agency may be required to follow its own regulations); Willis v. United States, 600 F.Supp. 1407, 1417 (N.D. Ill. 1985) (stating that if an agency creates regulations, "[it] may be required to carry them out in a constitutional fashion").

98. 953 F.2d 443 (8th Cir. 1992).

99. United States v. Simpkins, 953 F.2d 443, 445 (8th Cir. 1992) (citing United States v. Bartlett, 856 F.2d 1071 (8th Cir. 1988)), *cert. denied*, 112 S. Ct. 1988 (1988).

100. *See, e.g.*, United States v. Lester, 992 F.2d 174, 176-77 (8th Cir. 1993); United States v. Snell, 592 F.2d 1083, 1088-89 (9th Cir. 1979), *cert. denied*, 442 U.S. 944 (1979). The Department of Justice specifically excludes application of the policy with the following disclaimer:

> 3. Reservation
>
> The dual prosecution and successive federal prosecution policy statements are set forth solely for the purpose of internal Department of Justice guidance. The are not intended to, do not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter, civil or criminal, nor do they place any limitations on otherwise lawful litigative prerogatives of the Department of Justice.

USAM § 9-2.143.

101. *See* United States v. Caceres, 440 U.S. 741 (1979); Sullivan v. United States, 348 U.S. 170 (1954).

102. *In re* Grand Jury Subpoena Duces Tecum, 782 F. Supp. 1518, 1522 (N.D. Ala. 1992) ("The decision whether to investigate and prosecute a particular individual is generally a matter consigned by the Constitution to the discretion of the executive branch.") (citing Smith v. Meese, 821 F.2d 1484, 1490 (11th Cir. 1987). *See also* United States v. Johnson, 577 F.2d 1304, 1307 (5th Cir. 1978); United States v. Torquato, 602 F.2d 564, 569 (3rd Cir. 1979), *cert. denied*, 444 U.S. 941 (1979), ("The concept of separation of powers underlies the courts' concern that the prosecutorial function be relatively untrammeled.").

VII. ASSERTING THE DEFENDANT'S RIGHT TO NONDISCRIMINATORY PROSECUTION

The responsibility of investigating and prosecuting criminal offenders is reserved for and delegated to the executive branch of the government.[103] Generally, the decision of who will be subject to prosecution is left to prosecutorial discretion.[104] Courts are reluctant to interfere with a decision to prosecute on the basis that the constitutional separation of powers dictates deference to the decision of who, when, and where to prosecute.[105] Therefore, there is a rebuttable presumption that a prosecution is initiated in good faith.[106]

While courts will generally defer to prosecutorial discretion, the government is not free from all constraints in determining who it will prosecute.[107] Courts are charged with a duty to intervene where the rights afforded an individual under the Constitution and laws of the United States are in jeopardy.[108] Where the

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103. *See generally* United States v. Herman, 589 F.2d 1191, 1210 (3rd Cir. 1978), *cert. denied*, 441 U.S. 913 (1979) ("In formulating and prosecuting its case, the government must be relatively unconstrained in its deployment of resources. The choice of whom to prosecute and the strategy of prosecution are generally matters left wholly to the government's control."). At least one scholar has questioned the wisdom of allowing prosecutors to have unbridled discretion by stating the following:

> Why should a prosecutor—say, a county prosecutor—have discretionary power to decide not to prosecute even when the evidence of guilt is clear, perhaps partly on the basis of political influence, without ever having to state to anyone what evidence was brought to light by his investigation and without having to explain to anyone why he interprets a statute as he does or why he chooses a particular position on a difficult question of policy? Why should the discretionary power be so unconfined that, of half a dozen potential defendants he can prove guilty, he can select any one for prosecution and let the other five go, making his decision, if he chooses, on the basis of considerations extraneous to justice? . . . American assumptions that the prosecutors' discretion must be uncontrolled are very much in need of reexamination.

KENNETH CULP DAVIS, ADMINISTRATIVE LAW, § 4.09, 110-12 (1972).

104. *See, e.g.*, Oyler v. Boles, 368 U.S. 448, 456 (1962) ("Selectivity in prosecutorial decisions in general is permissible and even necessary."); United States v. Napper, 574 F. Supp. 1521, 1523 (D.C. 1983); United States v. Falk, 479 F.2d 616, 619 (7th Cir. 1973); United States v. Johnson, 577 F.2d 1304, 1307 (5th Cir. 1978). *See also* Allerhand, *supra* note 24, at 1155.

105. *See, e.g.*, Smith v. Meese, 821 F.2d 1484, 1492 (11th Cir. 1987), *reh'g denied*, 835 F.2d 291 (1987) (stating that the decision of whether or not an investigation and/or prosecution will occur has been allocated to the executive branch under the constitution); *see also In re* Grand Jury Subpoena Duces Tecum, 782 F. Supp. 1518, 1522 (N.D. Ala. 1992); United States v. Torquato, 602 F.2d 564, 569 (3rd Cir. 1979), *cert. denied*, 444 U.S. 941 (1979).

106. *Torquato*, 602 F.2d at 569 (citing United States v. Falk, 479 F.2d 616, 620 (7th Cir. 1973).

107. *Id.* at 568 ("To permit criminal prosecutions to be initiated on the basis of arbitrary or irrational factors would be to transform the prosecutorial function from one protecting the public interest through impartial enforcement of the rule of law to one permitting the exercise of prosecutorial power based on personal or political bias.").

108. United States v. Johnson, 577 F.2d 1304, 1307 (5th Cir. 1978) ("[I]n the rare situation in which the decision to prosecute is so abusive of this discretion as to encroach on

prosecution's abuse of discretion of whom to prosecute encroaches upon the defendant's constitutional rights, the judiciary must intervene to prevent an unconstitutional deprivation.[109]

Selective prosecution is not permissible on the basis of such factors as race, color, religion, or national origin.[110] A prosecutor is allowed to exercise selectivity in her selection of prosecution, but the systematic discrimination in enforcement and the unjust or illegal discrimination between persons who are similarly situated violates the protection of the equal protection clause and renders the prosecution invalid.[111] As noted by Justice Mathews in the United States Supreme Court decision of *Yick Wo v. Hopkins*:[112]

> . . . [If a law] is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is within the prohibition of the Constitution.[113]

In order to prevail with a claim that a particular prosecution violates a defendant's equal protection rights, the defendant has the burden of showing that the government has acted with an intent or purpose to discriminate.[114] The defendant must show that he or she is a member of a class of individuals which is subject to the selective enforcement of penal provisions.[115] "Some credible evidence must be adduced indicating that the government intentionally and purposefully discriminated against the defendant by failing to prosecute other similarly situated persons."[116] The defendant's burden to establish a showing of selective prosecution involves two elements: 1) that the defendant was singled out for prosecution among other defendants which were similarly situated; and 2) the motivation for the prosecution was improperly

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constitutionally protected rights, the judiciary must protect against unconstitutional deprivations.").

109. *Id. See also* Bolling v. Sharpe, 347 U.S. 497 (1954) (holding that the Equal Protection Clause of the Fifth Amendment applies to federal prosecutors), *rev'd*, Brown v. Bd. of Educ., 349 U.S. 294 (1955).

110. *See generally* Oyler v. Boles, 368 U.S. 448, 456 (1962). An excellent discussion of the different treatment of Indians and non-Indians can be found in David C. Williams, *The Borders of the Equal Protection Clause: Indians as Peoples*, 38 U.C.L.A. L. REV. 759 (1991).

111. *Id. See also* United States v. Torquato, 602 F.2d 564, 568 (3rd Cir. 1979).

112. 118 U.S. 356 (1886).

113. Yick Wo v. Hopkins, 118 U.S. 356, 373-74 (1886).

114. Snowden v. Hughes, 321 U.S. 1, 8 (1944), *reh'g denied*, 321 U.S. 804 (1944).

115. *Torquato*, 602 F.2d at 569-70.

116. *Id.* at 570.

founded upon race, religion, or other arbitrary classification.[117]

The burden of showing selective prosecution is a "rigorous" burden to overcome.[118] A defendant must show at least a colorable claim of an improper motive for prosecution and must further show that the prosecution has been selectively undertaken before he or she can even initiate discovery, to substantiate the impermissible prosecution, or prior to the court providing an evidentiary hearing on such issues.[119]

A defendant may wish to base the equal protection challenge on the United States Attorney's intentional and proposed rule disregard of the *Petite* policy.[120] The federal courts have been receptive to the defense of discriminatory prosecution and have extended that defense to the application of prosecutorial policies such as the *Petite* policy which appears neutral on its face.[121]

VIII. AVOIDING DUAL PROSECUTION BY ASSERTING THE SHAM DEFENSE OR ATTACKING THE SUPER PROSECUTOR

The United States Supreme Court implicitly carved out two exceptions to the dual sovereignty principle in *Bartkus*.[122] The first exception "bars a second prosecution [when] one prosecuting sovereign can be said to be acting as a 'tool' of the other" prosecuting sovereign.[123] A second and closely related exception provides a bar to prosecutions which amount to only a "sham" or "cover" for the first prosecution.[124] These exceptions have rarely if ever been successfully asserted by defendants in preventing dual prosecutions.[125]

One defendant has been successful in challenging his prosecution in federal court following a dismissal in a Virginia state court on the basis that the prosecution was only a sham.[126] In *United*

117. United States v. Washington, 705 F.2d 489, 494 (D.C. Cir. 1983); *accord* Attorney General of United States v. Irish People, Inc., 684 F.2d 928, 932 (D.C. Cir. 1982), *cert. denied*, 459 U.S. 1172 (1983), *reh'g denied*, 460 U.S. 1056 (1983).

118. *Torquato*, 602 F.2d at 569 (citing United States v. Malinowski, 472 F.2d 850, 860), *cert. denied*, 411 U.S. 970 (1973)) (3rd Cir. 1973).

119. *Id.* at 569-70 (citations omitted).

120. Allerhand, *supra* note 24, at 1147.

121. *Id.*

122. Bartkus v. Illinois, 359 U.S. 121 (1959).

123. United States v. Aboumoussallem, 726 F.2d 906 (2nd Cir. 1984) (citing Bartkus v. Illinois, 359 U.S. 121, 123 (1959)).

124. *Id.* (quoting *Bartkus*, 359 U.S. at 124).

125. *See, e.g.*, United States v. Aboumoussallem, 726 F.2d 906, 910 (2nd Cir. 1984) (stating that although the exceptions outlined in *Bartkus* are ambiguous, the court did not need to define the exceptions because the defendant's allegations fell "far short").

126. United States v. Belcher, 762 F. Supp. 666 (D.Ct. Va. 1991).

States v. Belcher,[127] the Honorable Glen M. Williams, Judge of the United States District Court for the Western District of Virginia, dismissed a federal indictment as "simply 'a sham and a cover' for the [prosecutors'] first, unsuccessful [attempt]" at prosecuting the defendant in state court for the same charges.[128]

While it may appear that Judge Williams had taken a bold step in protecting defendants from unjust persecution, a closer examination of the case reveals a rather unique set of facts.[129] The most unique and pivotal fact was that the prosecuting attorney prosecuted for both the State of Virginia and the United States.[130] Judge Williams found that the overlap of the prosecutor's functions as both a state and federal prosecutor destroyed the separation of the sovereignties and eliminated the dual sovereignty principle.[131] In his opinion, Judge Williams stated the following:

> In fact, it seems to the court that if the same prosecutor simultaneously derives power from both a state and the federal government, then the whole underpinning of federalism is destroyed. The fact that two sovereigns have essentially pooled their powers in one prosecutor strongly suggests to the court that in reality there are no longer two [separate] sovereigns at work. Instead, the pooling of prosecutorial power effectively creates one "super sovereign," i.e., a unitary government. Thus, a central government is actually at work here, not a federal government. . . [I]t was precisely such aggregations of power that the founding fathers sought to avoid when they established a federal system of government via the Constitution.[132]

The application of the decision in *Belcher* in this federal district is probably limited. The authors are not aware of any instances when the United States Attorney's Office has acted in the additional capacity of state or tribal prosecutor; it is more likely in North Dakota that the same individuals would share tribal and state prosecutorial duties. However, the principles first outlined in *Bartkus* and later relied on in *Belcher* may be able to be expanded. For instance, there have been increasing efforts to coordinate state

127. 762 F. Supp. 666 (D.Ct. Va. 1991).
128. United States v. Belcher, 762 F. Supp. 666, 671 (D.Ct. Va. 1991).
129. *Id.* at 668.
130. *Id.*
131. *Id.* at 670-71.
132. *Id.* at 671.

and federal prosecutions, and it may be argued that at some point the cooperation begins to blur the dual sovereignty long enough to cause an elimination of the separate sovereigns, as in *Belcher*.[133]

A number of courts have implied that collusion between federal and state authorities could prevent a second prosecution.[134] While cooperation between federal and state authorities will not bar prosecution, collusion between federal and state authorities may give rise to the "sham" exception of *Bartkus*.[135] In the age of limited law enforcement resources and advances in communications, it is possible that this exception to the dual sovereignty rule may grow from an inference in *Bartkus* to a widely accepted principle.

IX. A RECENT OPINION FROM THE FEDERAL DISTRICT COURT FOR THE DISTRICT OF NORTH DAKOTA

The Eighth Circuit on an appeal from the Federal District Court for the District of North Dakota recently addressed the issues surrounding the application of the *Petite* policy to limit prosecutions in *United States v. Lester*.[136] Lester had been accused of committing a rape which occurred on the Standing Rock Indian Reservation.[137] While the federal authorities investigated the claim, Lester was convicted of rape and simple assault by the Standing Rock Sioux Tribal Court.[138] Lester was sentenced to a term of incarceration for a period of six months for the rape conviction and thirty days for the simple assault conviction.[139]

Following the tribal court convictions, the federal authorities completed their investigation and charged Lester with aggravated sexual abuse in violation of sections 2241(a) and 1153 of Title 18 of the United States Code.[140] Lester sought to "dismiss the indictment on Double Jeopardy grounds for violation of the Department of Justice's internal *Petite* policy."[141] The motion to dismiss was

133. *See generally* Dawson, *supra* note 10, at 296-99 (stating that the close working relationship between state and federal agencies has blurred the separation of sovereignties).

134. *See generally* United States v. Bernhardt, 831 F.2d 181, 182 (9th Cir. 1987); United States v. Moore, 822 F.2d 35, 38 (8th Cir. 1987); United States v. Aboumoussallem, 726 F.2d 906, 910 (2nd Cir. 1984).

135. *See Bernhardt*, 831 F.2d at 182.

136. 992 F.2d 174, 176 (8th Cir. 1993).

137. *Lester*, 992 F.2d at 175.

138. *Id.*

139. *Id.* The Eighth Circuit also noted that the tribal court was limited to imposing imprisonment for one year or less, pursuant to 25 U.S.C. § 1302(7). *Id.* at n.1.

140. *Id.* Interestingly, the federal investigation was completed approximately six months after the tribal court sentencing. *Id.*

141. *Id.*

granted and the government appealed.[142]

On appeal, the Eighth Circuit reversed the decision of the District Court.[143] The Eighth Circuit rejected the defendant's assertion that the *Petite* policy granted the defendant substantive rights.[144] Relying on several prior Eighth Circuit cases, the Eighth Circuit quickly dispatched Lester's assertion.[145]

While *Lester* once again affirmed the view that the *Petite* policy does not create any substantive rights, it serves as an important reminder that courts may be willing to seek ways in which to bar the second prosecution of a defendant for the same acts for which he or she had previously been prosecuted.[146] The real question here is not whether the *Petite* policy bestows any magical rights, but whether the prosecution has elected to ignore the fundamentals of fairness. Any prosecutor should be able to prosecute, but can they refrain from prosecution when justice so requires? Unless a new approach to a perceived abuse of prosecutorial discretion is undertaken by defense attorneys, such as asserting an equal protection violation, and proves to be successful, it is clear that the *Petite* policy itself will not be a useful tool. Until such time that an alternative approach proves successful, defendants are left to the discretion of the prosecution. That discretion can either be abused or constructively used.

X. CONCLUSION

The State of North Dakota has within its borders federal, state, and tribal sovereigns. All three entities have an interest in insuring that their citizens are afforded the same protections as citizens of the other entities in individual dealings with the foreign judicial systems. In no area is this more important than in the area of criminal justice. All citizens should be afforded protection from needless prosecutions on the basis of race. While it is likely that more data will have to be compiled in order to demonstrate that there has been an improper prosecution of tribal members in fed-

142. *Lester*, 992 F.2d at 175.

143. *Id.*

144. *Id.* at 176. The defendant argued that Rinaldi v. United States, 434 U.S. 22, 27 (1977), and Thompson v. United States, 444 U.S. 248 (1980) established that the principle reason to enforce the *Petite* policy was fairness and that these decisions mandated that the *Petite* policy be applied. *Id.* Both *Rinaldi* and *Thompson* can be easily distinguished in that the dismissals in those cases were a result of the government's own motions. *Id.* at 176-77.

145. *Id.* at 176.

146. Again, the authors wish to reiterate that they do not necessarily disagree with dual prosecutions or with the outcome of *Lester*. From the facts of that case, it would appear that the United States had a substantial, unvindicated federal interest. *See Lester*, 992 F.2d at 176. Thus, a dual prosecution was warranted.

eral court following convictions in a tribal court, early warning signs have already appeared. It is alarming that in a state where the general practitioner is routinely in state and federal court that only one out of forty individuals who have experienced dual tribal and state prosecution have also experienced dual state and federal prosecution. While it is important that we leave with our prosecutors discretion as to which crimes will be prosecuted and which individuals will be indicted, we cannot stand by and watch as our laws are applied with "an evil eye and an unequal hand."